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No. 00-618

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

MICHAEL JACKSON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

Whether a federal court may grant habeas corpus relief, to a State prisoner on a Sixth Amendment claim of ineffective assistance of counsel, based solely on the absence of expert "medical" opinion and "social history" evidence at the sentencing phase of the prisoner's capital trial, (a) without regard to a "contemporary assessment" of the circumstances faced by trial counsel and (b) without proof that the evidence actually existed at the time of trial and was favorable to the defense.

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In her petition for certiorari, the State prison warden has presented the question whether the Ninth Circuit, despite formally citing this Court's standard of *Strickland* v. *Washington,* 466 U.S. 668 (1984), in evaluating respondent Jackson's ineffective-counsel claim, in reality applied a fundamentally different, per se rule of law in reaching the crucial conclusion that trial counsel was "incompetent" and that his incompetence had "prejudiced" the outcome of the sentencing phase of Jackson's capital trial. Warden Woodford's petition highlighted six eccentric features of the Ninth Circuit's analysis which combine to demonstrate that, rather than merely reaching an erroneous result in applying the true *Strickland* rule to the facts of Jackson's case, the Circuit indeed applied a novel rule contrary to *Strickland.* (See Pet. for Cert 10-11.) In his opposition brief, Jackson fails to refute the Warden's demonstration.

• The Warden's certiorari petition pointed out that the Ninth Circuit's error in *presuming* penalty-phase "prejudice" question was evident in its reliance upon unproved factual allegations contained in numerous "social history" affidavits—reliance that ignored the fact that Jackson had agreed, and the district court explicitly had ruled, the

declarations were not admitted into evidence for the truth of the matters asserted therein on the issue of *Strickland* "prejudice." In his opposition brief, Jackson does not deny that the affidavits were inadmissible as proof of *Strickland* prejudice. Indeed, he seems to implicitly admit the point by arguing, for whatever reason, that they had been admitted for a different limited purpose other than as proof that the declarants really would have been available and really would have testified as advertised. (Opp. Cert. 13-14.)

• The Warden's petition explained that opinion testimony by psychiatrist Aniline, upon which the Ninth Circuit heavily relied, did nothing more than presume without any proof that certain mental and physical tests actually would have yielded information beneficial to Jackson's defense if they had been undertaken after his arrest a decade earlier. Again, Jackson's opposition brief does not dispute that, with respect to the issue of the physical and mental tests, the Warden properly characterized the opinion evidence as a mere tautology or truism that simply hypothesized prejudice from the lack of testing. Instead, Jackson says that the psychiatrist's opinion was based, not upon the absence of testing, but upon "clinical observations of [Jackson] in connection with the evidentiary hearing." (Opp. Cert. 9-10.) But a reading of the relevant portions of the psychiatrist's testimony, where the doctor purports to explain how Jackson's alleged mental condition might have been better proved at the time of the criminal trial, shows his preoccupation with the omitted tests. (See Opp. Cert. App. 22-25.) The district court judge correctly understood the doctor's testimony that way too. (U.S.D.C. Op. 22.) Anyway, Jackson does not say what the alleged "clinical observations" were, or explain how they would have been available to trial counsel more than a decade earlier at the time of the State proceedings. Indeed, at the federal evidentiary hearing, psychiatrist Aniline acknowledged that "nothing extraordinary . . . jumped out at me" in his interviews with Jackson years after

the State trial, and that Jackson appeared to be "normal." (Vol. 2, Ev. Hg. Tr. 61-65.)[1]/

• The Warden's petition, citing the record in support, explained that the Ninth Circuit's condemnation of trial counsel concerning his handling of psychiatrist Mead failed to take account of the fact that certain evidence in the doctor's report, otherwise unknown to the prosecution, would have been revealed to the detriment of the defense if counsel had called the doctor as a witness. (Cert. Pet. 13.) Jackson's opposition brief merely repeats the Ninth Circuit's bald but erroneous assertion that there was no such damaging evidence; but it does not even mention the evidence specifically identified in the Warden's petition, let alone show it to have been insignificant or non-existent. (Opp. Cert. 15-16.)

• Similarly, Jackson's opposition brief declines to dispute at all the Warden's account of the other egregious errors in the Ninth Circuit's purported *Strickland* analysis. Jackson cannot dispute the undeniable fact that the Ninth Circuit erroneously claimed that no medical mental-state had been submitted to the penalty-phase jury—a claim that flies in the face of the fact that extensive guilt-phase evidence of such kind was before them for their sentencing consideration. Nor does Jackson's brief show the Warden to be incorrect in pointing out that, the Ninth Circuit's opinion notwithstanding, Jackson in fact never produced any expert testimony at the federal hearing or elsewhere to show that he suffered from the alleged

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[1] Jackson never even claimed, in either his federal habeas corpus petition or in the state court proceedings, that trial counsel was remiss in not calling psychiatrist Aniline to the stand in the penalty phase of the State court trial. (See 5 Supp. Excerpts of Record [ER](9th Cir. Case No. 97-99032) 1240-1; 8 Supp. ER 1834-6; 9 ER 2562; Amended Petition for Writ of Habeas Corpus (U.S.Dist.Ct. Case No. 91-4249) 51-53.) Nor, despite his argument in the Opposition Brief (Opp. Cert. 8-9, 16), did Jackson ever claim in either State court or in the federal petition that trial counsel should have called psychiatrist Skrdla as a penalty-phase witness. (See 5 Supp. ER 1240-1.)

"schizophrenia" and PCP "addiction." Jackson, also, does not challenge the accurate statement in the Warden's certiorari petition that the defense team in fact sought penalty-phase "mitigation" evidence from Jackson's mother, Jackson's wife, and Jackson himself, but that none of them provided any beyond that which counsel actually presented to the sentencing jury. Nor, finally, does he cite any evidence to dispute the Warden's statement that, notwithstanding the erroneous account given in the Ninth Circuit opinion, Jackson never produced any evidence that psychiatrist Mead would have testified at the penalty phase that Jackson in fact had not premeditated his intention to kill the police officer. (Cf. Opp. Cert 16.)

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Although not directly or successfully taking issue with the crucial points spelled out in the Warden's certiorari petition, Jackson's opposition brief injects some additional allegations of his own about trial counsel's performance. The Warden will briefly respond.

Jackson first denigrates trial counsel's penalty-phase preparation and performance generally. (Opp. Cert. 3 et seq.) But counsel undertook a serious investigation of the medical/mental-state issues. He consulted with three psychiatrists, and undertook to have Jackson submit to scientific mental tests and psychiatric interviews. He presented the underlying factual bases for his mental-state arguments through eyewitnesses to the crime events, through testimony of hospital nurses and a staff doctor, through the testimony of Jackson himself, and through the expert opinion evidence of one of the defense psychiatrists. Indeed, counsel consulted with and called as a trial witness the very same psychiatrist, Orm Aniline, upon whom Jackson and the Ninth Circuit heavily and ironically relied, more than a decade later, for their conclusion that counsel presented the mental-state case ineffectively. Counsel also undertook an investigation into petitioner's

medical, school, juvenile-court, work, and military records; but he was constrained to conclude that they disclosed no useful mitigation evidence. His investigator interviewed Jackson's mother and wife to obtain mitigation, but was unsuccessful in obtaining more than that to which those witnesses in fact testified in the penalty hearing. And, as the district court found as a matter of fact, trial counsel indeed consulted with Jackson and sought such evidence form Jackson himself, but was rebuffed. (U.S.D.C. Op. 77; cf. Opp. Cert. 4-5 (incorrectly implying otherwise).) Counsel provided reasonably effective assistance under all the circumstances.

Jackson, finally, reprises arguments about counsel's alleged lack of investigation of the prosecution's "aggravation" evidence involving two of Jackson's earlier crime victims, Taylor and Bennallack. (Opp. Cert. 6-8.) The Taylor sodomy evidence, as Jackson acknowledged in State court proceedings, was admissible and aggravating under the California statutory scheme, for it showed Jackson's prior violence-related criminal conduct; and Jackson's federal lawyers later produced no witness who might have undermined its effect. Indeed, Jackson, though asked about the incident, would not provide his own lawyer with any helpful details. (U.S.D.C. Op. 85-6; cf. Opp. Cert. 15 (incorrectly implying otherwise).) The Bennallack assault evidence was also manifestly admissible as the same kind of "aggravation"; and, again, Jackson's federal counsel produced no witness to controvert its effect.[2]/

Indeed, the outstanding characteristic of this case is the fact that, despite years of effort and federal habeas corpus litigation, and despite the hollow claims that trial counsel failed to uncover important additional evidence, Jackson in federal

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[2] More fundamentally, Jackson never challenged, either in State court or in the federal habeas corpus petition, counsel's performance with respect to the Bennallack evidence. (U.S.D.C. Op. 84 at n. 38; see 8 Supp. ER 1836 [State Petition]). The district court, accordingly, refused to consider the belated claim (U.S.D.C. 84 n. 38); and the Ninth Circuit never even mentioned it.

court never produced any significant evidence beyond that which his trial lawyer actually presented to the State jury. The Ninth Circuit, however, ignored this. Instead, although making some technical references to the *Strickland* rule, it granted habeas corpus relief by blindly demanding that certain types of evidence automatically must be produced at sentencing hearings in capital cases, and presuming without any proof that such evidence in fact would have been favorable to the defense case. In this way, the Ninth Circuit in substance applied a "rule" that is contrary to this Court's clearly-established rule in *Strickland*.

CONCLUSION

For these reasons, and as argued in the Warden's petition, this Court should grant certiorari in this case.

Dated: November 28, 2000.

Respectfully submitted,

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